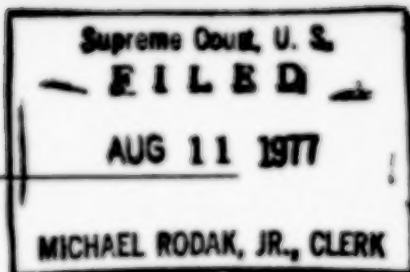


**In the
Supreme Court of the United States.**



OCTOBER TERM, 1977.

No. 76-1040.

THOMAS SANABRIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FIRST CIRCUIT.

Brief for the Petitioner.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977.

No. 76-1040

THOMAS SANABRIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the court of appeals
(Pet. App. 1a-12a) is reported at 548
F.2d 1.

Jurisdiction

The judgment of the court of appeals
(Pet. App. 13a) was entered on December 29,
1976. The petition for a writ of certio-

rari was filed on January 29, 1977.¹
The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provision and Statute
Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"

¹ Despite the fact that petitioner and his counsel acted diligently to ensure that the petition would be timely filed, the petition was filed nine hours later than the time prescribed by Rule 22(2) of the Rules of this Court. On February 11, 1977, petitioner filed a Motion to Waive Supreme Court Rule 22(2) and Deem Petition for Certiorari Timely Filed. This motion and four accompanying affidavits detail the efforts made to ensure that the petition would be timely filed, and explain that the only reason it was not in fact timely filed was because a messenger, unaccountably, and without notifying anyone, failed to follow the emphatic instructions he had been given. It is well established that lateness in the filing of a petition for certiorari in a federal criminal case is not a jurisdictional defect, and may be waived by

(cont. on page 3)

Section 3731 of Title 18 of the United States Code provides in pertinent part:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

Questions Presented

The petitioner was charged in a single-count indictment with violating 18 U.S.C. §1955, which makes it a federal crime to engage in "an illegal gambling business." The federal statute defines such a business as one which, among other things, involves five or more persons and is in violation of state law. At petitioner's trial, the Government introduced

¹ (cont. from page 2)

this Court in the exercise of its discretion. E.g., Schacht v. United States, 398 U.S. 58, 64 (1970); Durham v. United States, 401 U.S. 481 (1971); Taglianetti v. United States, 394 U.S. 316, n. 1 (1969).

evidence that the single gambling business charged in the indictment involved illegal state betting on (a) horse races, and (b) numbers. The court excluded evidence of the numbers activity on the ground that this theory of criminal liability was not encompassed by the indictment. The court then found that the evidence of horse betting was insufficient to support a conviction, and entered a judgment acquitting the petitioner.

1. Do 18 U.S.C. §3731 and the double jeopardy clause permit the Government to appeal from the judgment of acquittal?

2. Can petitioner be retried on the basis of the numbers evidence consistent with the Constitutional guarantee that no person shall be twice placed in jeopardy for "the same offense"?

3. Do 18 U.S.C. §3731 and the double jeopardy clause permit the Government to obtain review of the district court's ruling on the numbers evidence considering that

a. it was not the dismissal of

an entire count of an indictment?

b. it was an evidentiary ruling made after jeopardy had attached?

Statement of the Case

Petitioner and ten codefendants were tried for allegedly violating 18 U.S.C. §1955, which makes it a federal crime to engage in an "illegal gambling business." The federal statute defines such a business as one which (i) is in violation of state law, (ii) involves five or more persons, and (iii) has been in continuous operation for more than thirty days or has a gross revenue of \$2,000 in any single day. The single-count indictment (Pet. App. 15a-16a) charged the defendants with engaging in:

"an illegal gambling business [involving] . . . accepting, recording, and registering bets and wagers on a partimutual [sic] number pool and on the result of a trial and contest of skill, speed and endurance of beast . . . [in] violation of the laws of the Commonwealth of Massachusetts, to wit, M.G.L.A. Chapter 271, Section 17"

At trial, the Government introduced evidence purporting to show that the

single gambling business charged in the indictment involved illegal state betting on (a) horse races, and (b) numbers. At the close of the Government's case, petitioner and his codefendants moved to strike as irrelevant that portion of the Government's evidence which pertained to numbers activity. A. 4-12. They argued that the only Massachusetts statute cited in the indictment -- Mass. G.L. c. 271, §17 -- had been interpreted by the Massachusetts courts to pertain exclusively to gambling activity involving apparatus used in betting on a game of competition, such as horse racing. Id. They maintained that numbers activity was prohibited only by Mass. G.L. c. 271, §7. Id.

The district court initially denied this motion (A. 12) but, on the basis of legal research it did in an intervening recess, changed its decision after both sides had rested. A. 12-13. Accordingly, the district court excluded the Government's evidence of numbers activity and ruled that the case could go to the jury solely on the Government's horse betting theory. Id.

Petitioner then moved for a judgment

of acquittal on the ground that there was insufficient evidence of his involvement in horse betting to support his conviction on this basis. A. 16-20. Focusing on the evidence of horse betting against petitioner, and finding that it was indeed insufficient, the district court granted his motion. Id.

The Government sought appellate review of the district court's judgment acquitting the petitioner. It conceded that there could be no review of the ruling that there was insufficient evidence of petitioner's involvement in horse betting to support a conviction on that theory. Pet. App. 3a. But it maintained that there could be review of the decision to exclude the evidence of numbers activity, and requested that a new trial be ordered to give the Government the opportunity to convict petitioner on that theory. Id.

Observing that the case presented "several substantial questions" concerning the Government's right to appeal from an adverse decision in a criminal case (Pet. App. 2a), the court of appeals found that the district court's decision to exclude

the evidence of numbers activity was indeed reviewable. Id. at 4a-12a. Turning to the merits, it ruled that the lower court had erred in "dismissing" the "numbers based charge" and remanded the case so that the Government could retry the defendant on this "portion of the indictment." Id. at 3a-4a, 12a.

In finding reviewable the district court's ruling on the evidence of numbers activities, the court of appeals considered two issues: first, whether the appeal was authorized by the Criminal Appeals Act, 18 U.S.C. §3731; and, second, whether further prosecution of the defendant under 18 U.S.C. §1955 was permitted under the double jeopardy clause. Pet. App. 4a-12a.

The court of appeals found that the first issue arose because the ruling on the numbers evidence was "not formally a dismissal of an entire count" of an indictment as 18 U.S.C. §3731 seemed to require. Pet. App. 5a. Nevertheless, the court found that an appeal was authorized because it interpreted the word "count" in the statute not as a term of art but as a shorthand expression for

"any discrete basis for the imposition of criminal liability that is contained in the indictment." Id. at 5a-7a. Thus, since the district court's ruling on numbers evidence "clearly eliminated one basis for imposing criminal liability on defendant," the Government could appeal even though the ruling was not the dismissal of an entire count. Id.

Turning to the double jeopardy issue, the court found that like a motion for a mistrial, petitioner's motion to exclude the evidence of numbers activity was an election "to forego his valuable right to have his trial on numbers charges concluded by the first tribunal." Pet. App. 11a. Consequently, the court concluded that further prosecution of petitioner was permitted under the decisions authorizing further prosecution after a defendant's voluntary motion for a mistrial. Id.

The court of appeals did not address the issue of what justified its implicit assumption that the district court's ruling on numbers evidence could be reviewed separately from the judgment of acquittal. Nor did the court of appeals

discuss the question of whether prosecution of the petitioner on the basis of numbers evidence would be a prosecution for "the same offense" of which petitioner had been acquitted. Indeed, the only argument the court of appeals offered in support of its premise that the indictment could properly be regarded as making two distinct charges -- a horse betting charge, and a numbers charge -- was that the defendant "could possibly have made a pretrial objection to the indictment as duplicitous." Pet. App. 5a, n. 4.²

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In fact, as this brief demonstrates, the indictment was not duplicitous (see section II.B. infra), the district court's ruling on numbers evidence could not be reviewed separately from the judgment of acquittal (see pp. 11-13 infra), and a second trial of petitioner on the basis of numbers evidence would be a prosecution for "the same offense" of which petitioner was acquitted (see section II.A. infra).

Introduction and Summary of Argument

The decision of the court of appeals rests on the fundamental misconception that this case can be split into two separate and distinct parts. Thus, the court reads the indictment as charging two discrete offenses against the petitioner -- a horse betting offense, and a numbers betting offense. And the court compounds this error by viewing the district court as having made two independent decisions -- (1) a "ruling that there was insufficient evidence of horse betting to support a conviction" (Pet. App. 3a); and (2) a "dismissal" of the "numbers based charge" (Id. at 12a) on the ground that the indictment failed to give petitioner "sufficient notice" of that charge (Id. at 8a).

In fact, this case is bound into an indivisible whole by two overarching unities which the court of appeals all but ignores: (1) the single-count indictment charging that petitioner committed but one crime (engaging in an illegal gambling business in violation of 18 U.S.C. §1955) and (2) the unitary judgment acquitting

petitioner of that crime.

To split in two both the indictment and the judgment of acquittal for the purpose of extracting an appealable ruling is to misconceive the interest in finality which the double jeopardy clause was designed to protect. For acquittals and other prosecution-terminating judgments to be truly final, the underlying rulings on which they are based must be regarded as being merged into the judgments themselves. Thus, in Fong Foo v. United States, 369 U.S. 141, 143 (1962), this Court held that even if an acquittal was based:

"upon an egregiously erroneous foundation . . . [n]evertheless, 'the verdict of acquittal was final, and could not be reviewed . . . without putting [the defendants] twice in jeopardy, and thereby violating the Constitution.'"

Accord, United States v. Martin Linen Supply Co., 97 S.Ct. 1349, 1354 (1977).

Here the district court's ruling excluding the numbers evidence was but one of many rulings that formed the foundation for the judgment of acquittal ultimately entered. To allow appellate

review of that ruling on the theory that it constituted a "dismissal" of "a discrete basis of criminal liability" is to undermine the finality of all acquittals by implicitly inviting the prosecution to go behind them in search of similar "appealable" "dismissals." Indeed, there is no end to the decisions that could be rendered "appealable" in this manner because virtually every decision excluding evidence can be characterized as "dismissing" a "basis of criminal liability."

In Brown v. Ohio, 45 U.S.L.W. 4697, 4700 (U.S. 1977), this Court stated:

"The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."

Similarly, the double jeopardy clause cannot be avoided through the expedient of dividing a single crime into layers of "discrete bases of criminal liability." But here, by splitting the single crime charged in the one-count indictment into a horse betting offense and a numbers betting offense, that is precisely what the Government has attempted to do.

Petitioner was tried on a one-count indictment for the crime of engaging in an illegal gambling business in violation of 18 U.S.C. §1955. After petitioner was placed in jeopardy, and after both prosecution and defense presented their cases and rested, petitioner was acquitted of that crime. To permit the petitioner to be retried now on the basis of numbers evidence would be to permit further prosecution of the petitioner for the very crime of which he was acquitted.³

³ Indeed, in its response to the petition for certiorari, the Government concedes:

"The district court terminated the entire prosecution with respect to petitioner. Although, in light of the arguments the United States made on appeal, the court of appeals did not remand for a second trial on the horse betting portion of the gambling enterprise, there was only a single gambling enterprise, albeit one that could be proved in several ways." Memorandum for the United States, p. 10 (emphasis added).

The importance of this concession cannot be overemphasized, for if "there was only a single gambling enterprise," a second trial of the petitioner would necessarily be for engaging in the same gambling

(cont. on page 15)

Consequently, the Constitution bars such a trial because it would be a plain violation of the prohibition against placing a person twice in jeopardy for "the same offense."⁴

3 (cont. from page 14)

enterprise, and hence for committing the same crime, as to which he was acquitted in the first trial.

⁴ Indeed, to maintain that "the numbers portion" of the indictment somehow survived the judgment of acquittal is to fall into the jaws of an inescapable contradiction. There are only two possibilities: Either the district court was right, and the indictment embraced only horse betting, or the Government was right, and the indictment embraced both horse betting and numbers betting. If the indictment embraced only horse betting, then the numbers evidence was properly excluded, and the Government's appeal had no substantive merit. If, on the other hand, the indictment embraced both numbers betting and horse betting, then the judgment of acquittal necessarily embraced both numbers betting and horse betting, and the "numbers portion" of the indictment could not possibly have survived the acquittal on that indictment. Thus, the more vigorously the Government argues that the district court erred in excluding the numbers evidence because such evidence was encompassed by the indictment, the more plainly it demonstrates that there is no basis for a second trial.

* * *

The argument portion of this brief is divided into three sections.

The first demonstrates that the acquittal entered by the district court was indeed an acquittal in substance as well as form because it was based on the district court's finding that the evidence introduced by the prosecution was insufficient to sustain a conviction. Consequently, the court of appeals lacked appellate jurisdiction under the fundamental rule of double jeopardy jurisprudence which secures the finality of acquittals and insulates them from review. United States v. Martin Linen Supply Co., 97 S.Ct. 1349, 1354 (1977).

The second section shows that a second trial of the petitioner on the basis of numbers evidence is constitutionally barred because it would be for "the same offense" of which he was acquitted. Under the double jeopardy clause, the scope of an acquittal is measured not by the vague notion employed by the court of appeals, "discrete basis of criminal liability," but rather by the concept of "an offense," a concept which

takes its substance from the legislature's definition of the crime in question in the pertinent criminal statute. Here "the offense" of which petitioner was acquitted was the offense of engaging in an illegal gambling business as defined by 18 U.S.C. §1955. Since a second trial of petitioner on the basis of numbers evidence would be a trial for engaging in the same illegal gambling business which was the subject of his first trial, it would be a trial for "the same offense" of which he was acquitted, notwithstanding the difference in proof.

The third section demonstrates that in addition to being constitutionally barred by the double jeopardy clause, the Government's appeal here was also barred because it was not authorized by the Criminal Appeals Act, 18 U.S.C. §3731. The Criminal Appeals Act permits the Government to appeal from a district court decision "dismissing an indictment or information as to any one or more counts." Here the Government concedes that it cannot appeal from the judgment of acquittal insofar as it determines that petitioner cannot be convicted on the basis

of horse betting evidence. At the same time, however, the Government contends that it can appeal from the district court's decision excluding numbers evidence. That decision, however, was not the "dismissal" of an entire count of an indictment. Indeed, it was not a dismissal at all, but rather an evidentiary ruling. And the Criminal Appeals Act expressly indicates that the Government may not appeal evidentiary rulings made, as the one here, after jeopardy has attached.

Argument

I. THE DISTRICT COURT'S JUDGMENT WAS AN ACQUITTAL IN SUBSTANCE AS WELL AS FORM WHICH COULD NOT BE VALIDLY REVIEWED WITHOUT VIOLATING PETITIONER'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE.

The threshold issue in this case is whether the judgment of acquittal entered by the district court was an acquittal for purposes of the double jeopardy clause. If it was, there can be no question that the court of appeals had no jurisdiction to hear the Government's appeal. This is because, as this Court recently reaffirmed in United States v. Martin Linen Supply Co., 97 S.Ct. 1349, 1354 (1977):

"Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that "[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution'" (quoting United States v. Ball, 163 U.S. 662, 671 (1896)).

Accord, Fong Foo v. United States, 369 U.S. 141 (1962). See also Kepner v. United States, 195 U.S. 100 (1904); United States v. Sisson, 399 U.S. 267,

289-290 (1970); Serfass v. United States, 420 U.S. 377, 392 (1975).⁵

⁵ In three cases decided in early 1975 -- United States v. Wilson, 420 U.S. 332; United States v. Jenkins, 420 U.S. 358; and Serfass v. United States, 420 U.S. 377 -- this Court formulated a bright line test for determining when the double jeopardy clause bars further prosecution of a defendant. That test provides that when, after a defendant is placed in jeopardy, a trial terminates "in [his] favor," the defendant is shielded from "further proceedings . . . devoted to the resolution of factual issues going to the elements of the offense charged." United States v. Jenkins, 420 U.S. at 365, n. 7, 370 (1975). Thus, the principle that an acquittal bars further prosecution of a defendant is actually a sub-rule -- albeit the most firmly established and essential sub-rule -- of the general standard articulated by Wilson, Jenkins and Serfass. That is to say, an acquittal is one of the ways a trial may terminate "in [a] defendant's favor" following which the Government may neither appeal nor reprosecute. For examples of other ways a trial may terminate following which the Government may neither appeal nor reprosecute, see Finch v. United States, 45 U.S.L.W. 3851 (U.S. 1977) (information dismissed, after consideration of stipulated facts, for failure to state an offense); New York v. Brown, 40 N.Y.2d 381 (1976), cert. denied, 45 U.S.L.W. 3840 (U.S. 1977) (indictment dismissed on ground that crime charged included element regarding which prosecution had introduced no evidence).

The test of whether a ruling is an acquittal from which no appeal may be taken was formulated by this Court in Martin Linen as follows:

"[W]e must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." 97 S.Ct. at 1354-55.

Under this test, it is plain that petitioner was the beneficiary of just such an unappealable acquittal.

In granting the motion made by petitioner and his codefendants to exclude the evidence of numbers activity, the district court made it very clear that it was not thereby dismissing the indictment or otherwise terminating the prosecution against any one of them. On the contrary, the court stated it was simply

"grant[ing] the Motion to Strike so much of the evidence in the case as has to do with numbers betting." A. 13.

Indeed, that the indictment retained its legal vitality following this ruling is proved beyond doubt by the fact that

petitioner's ten codefendants were ultimately convicted and sentenced under it.

Thus, it is plain that before the district court could acquit petitioner it had to take a further step. That step was to determine whether there was sufficient evidence of petitioner's involvement in horse betting to permit his case to go to the jury on that ground. The prosecutor argued that there was sufficient evidence. A. 19. The district court, however, in language that can leave no doubt that it was evaluating the evidence and resolving "factual elements of the offense charged," disagreed:

"You haven't based your charge on Sanabria on anything that he did, only on what somebody else is saying, and in order to do that you have to make a preliminary showing that Sanabria was connected with this operation, and by that I mean a horse operation. I don't think you've done it. The Motion for a Judgment of Acquittal as to Sanabria is allowed." A. 19-20.

Thus, under the test established by Martin Linen, the district court's ruling was clearly an acquittal in substance as well as form, and, therefore, could not

be reviewed "without putting [the petitioner] twice in jeopardy, and thereby violating the Constitution." 97 S.Ct. at 1354.⁶

⁶ Thus, this case is plainly distinguishable from Lee v. United States, 97 S.Ct. 2141 (1977). In Lee, the defendant, after the prosecutor's opening statement, moved to dismiss an information charging him with theft on the ground that it did not allege that the offense was knowingly or intentionally committed. 97 S.Ct. at 2143. The trial court tentatively denied the motion, pending an opportunity to consider the matter more fully, and proceeded to hear the evidence. Id. at 2144. After both sides had rested, the court dismissed the information on its face. Id. Lee was subsequently retried on a valid indictment, and convicted. Id. This Court upheld the conviction over defendant's claim that the second trial was barred by the double jeopardy clause, because it found that the decision terminating the first trial was not a determination that "the defendant simply cannot be convicted of the offense charged." Id. at 2146. On the contrary, the dismissal rested on a ground -- a technical pleading defect in the accusatory instrument -- thoroughly "consistent with reprosecution." Id.

Here, on the other hand, petitioner's trial was terminated not because of a pleading defect in the accusatory instrument, but rather because the evidence was insufficient to sustain a conviction.

(cont. on page 24)

6 (cont. from page 23)

Thus, the decision terminating petitioner's trial was the quintessential example of a ruling that "the defendant simply cannot be convicted of the offense charged," and was utterly inconsistent with any notion of reprosecution. Consequently, far from supporting the Government's position, Lee actually confirms that the Government's appeal here was barred by the double jeopardy clause.

II. THE JUDGMENT OF ACQUITTAL DISCHARGED PETITIONER OF THE CRIME OF ENGAGING IN AN ILLEGAL GAMBLING BUSINESS. FURTHER PROSECUTION ON THE BASIS OF NUMBERS EVIDENCE IS BARRED BECAUSE IT WOULD BE PROSECUTION FOR "THE SAME OFFENSE" OF WHICH PETITIONER WAS ACQUITTED.

A. A retrial of the petitioner on the basis of numbers evidence would be a trial for the same offense of which he was acquitted.

As demonstrated above, there can be no question that petitioner was the beneficiary of an unappealable acquittal. The only remaining constitutional issue is the scope of protection that acquittal afforded.

The double jeopardy clause provides that no person shall be twice placed in jeopardy for "the same offense." This language indicates that the scope of a judgment of acquittal is measured in terms of the "offense" of which it discharges the defendant. Once acquitted of an "offense," the defendant cannot be prosecuted further for "the same offense." Thus, further prosecution of the petitioner here is constitutional only if a

trial of the petitioner on the basis of numbers evidence would not be a trial for "the same offense" of which petitioner has already been acquitted.

What constitutes an offense for double jeopardy purposes is the province of the legislature.⁷ Thus, an analysis of when the Constitution bars a prosecution for "the same offense" must begin

⁷ "Because it was designed originally to embody the protection of the common law pleas of former jeopardy, see United States v. Wilson, 420 U.S. 332, 339-340 (1975), the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." Brown v. Ohio, 45 U.S.L.W. at 4698.

with a close examination of how the legislature has defined the crime in question in the relevant statute.

In particular, the statute must be evaluated to determine whether it was designed to punish a discrete act, or whether it was designed to punish a continuing course of conduct. Common sense notions about the scope of a single crime or criminal transaction are often unreliable. Thus, what appears to be "a single transaction," such as a sale of narcotics (see Gore v. United States, 357 U.S. 386 (1958)), may constitute two or more offenses because it is a violation of two or more separate statutes. Similarly, "a single transaction," such as the robbery of several persons at the same time (see Ashe v. Swenson, 397 U.S. 436 (1970)), may constitute multiple offense because it is a multiple violation of the same statute.⁸ On the other hand, what

⁸ But see Justice Brennan's opinion in Ashe, 397 U.S. at 453-454 and n. 7 (1970), arguing that the double jeopardy clause requires the prosecution in one proceeding, except in extremely limited circumstances,

appear to be numerous distinct transactions, such as the acts embraced by a complex conspiracy (see Braverman v. United States, 317 U.S. 49 (1942)), may constitute but one offense because the statute defines the offense, not as a discrete act, but as a course of conduct.

Here the relevant statute is 18 U.S.C. §1955. Everything about this statute indicates that the crime it was designed to punish is a crime of broad scope. Thus, the statute provides,

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years, or both."

The crime defined by this language is not a discrete act but the whole array of acts embraced in the notion of owning, running or participating in an "illegal gambling business." The broad nature of the

8 (cont. from page 27)

"of all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction." Accord, Brown v. Ohio, 45 U.S.L.W. at 4700 (Brennan, J. and Marshall, J. concurring).

offense is further demonstrated by subparagraph (b)(1) of the statute which defines such an "illegal gambling business" as

"a gambling business which --

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day."

And, perhaps most revealing of all, the legislative history of the statute leaves no doubt Congress's aim was to punish not isolated instances of gambling, but rather gambling activity so "systematic," "continuous" and "substantial" as to be of national concern:

"The intent of section 1511 and section 1955, below, is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. It is anticipated that

cases in which their standards can be met will ordinarily involve business-type gambling operations of considerably greater magnitude than simply meet the minimum definitions. The provisions of this title do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those corrupt State and local officials who make it possible for them to function." House Report 91-1549, reproduced in 1970 U.S. Code Cong. and Adm. News, pp. 4007, 4029 (emphasis added).

See also Iannelli v. United States, 420 U.S. 770, 786-791 (1975) (discussing legislative history of 18 U.S.C. §1955).

Because the crime defined by 18 U.S.C. §1955 is a crime of broad scope, the scope of an acquittal under this statute is also necessarily broad. Here the indictment charged the petitioner with engaging in an illegal gambling business in violation of 18 U.S.C. §1955

"[f]rom on or about June 1, 1971 and continuing up to and including November 13, 1971." Pet. App. 15a.

The district court's judgment of acquittal absolved the petitioner of "the offense charged." Pet. App. 14a. Moreover, the judgment described the offense charged as follows:

"The defendant having been set to the bar to be tried for the offense of unlawfully engaging in an illegal gambling business, in violation of Title 18, United States Code, Sections 1955 and 2, and the Court having allowed defendant's motion for judgment of acquittal at the close of government's evidence,

It is hereby ORDERED that the defendant Thomas Sanabria be, and hereby is, acquitted of the offense charged" Pet. App. 14a (emphasis added).

It is, therefore, manifest that any further prosecution of the petitioner under 18 U.S.C. §1955, based on numbers evidence or, for that matter, any other evidence relating to the time period embraced by the indictment,⁹ would be for

⁹ Indeed, because the offense defined by 18 U.S.C. §1955 is a continuing offense, petitioner's acquittal bars further prosecution not only for activity strictly within the time period (June 1 to November 13, 1971) embraced by the indictment,

the same offense of which petitioner was acquitted, and would, therefore, be barred by the double jeopardy clause.

In Brown v. Ohio, 45 U.S.L.W. 4697, 4700 (U.S. 1977), this Court stated:

"The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."¹⁰

9 (cont. from page 31)

but for activity within the penumbra of that time period as well. See In re Nielsen, 131 U.S. 176 (1889) (conviction for unlawful cohabitation with two women from October 15, 1885 to May 13, 1888 barred prosecution for adultery with one of the women on May 14, 1888 because the adultery was included in the continuous crime of unlawful cohabitation); I Anderson, Wharton's Criminal Law and Procedure §145, pp. 351-353 (1957) ("Only one prosecution may be had for a continuing crime A prosecution upon a charge laid at a date prior to a former indictment is barred by a conviction or acquittal upon such former indictment, when the offense charged is a continuing one.").

¹⁰ See also I Anderson, Wharton's Criminal Law and Procedure, §145, p. 351 (1957) ("When an offense charged consists of a series of acts extending over a period of

(cont. on page 33)

Similarly, the double jeopardy clause may not be circumvented here by the expedient of dividing the crime defined by 18 U.S.C. §1955 into a series of evidentiary units. Contrary to the holding of the court of appeals, the indictment here did not charge the petitioner with the offense of engaging-in-an-illegal-gambling-business-through-horse-betting. There is no such offense. Nor would a second trial of the petitioner be for the offense of engaging-in-an-illegal-gambling-business-through-numbers-betting, because that offense does not exist either. The offense which Congress has defined is simply the offense of engaging in an illegal gambling business. That is the offense for which petitioner was prosecuted and of which he was acquitted in the district court. It is also the offense for which petitioner would be prosecuted in a second trial on

10 (cont. from page 32)

time, a conviction or acquittal for a crime based on a portion of that period will bar a prosecution covering the whole period.").

the basis of numbers evidence.¹¹

¹¹ Indeed, this case presents the clearest illustration possible of a projected prosecution of a defendant for the same offense for which he has already been prosecuted, because the statutory crime at issue in both prosecutions -- 18 U.S.C. §1955 -- would be identical. Courts have long held, of course, that the policies of the double jeopardy clause apply not only to offenses which are exactly the same but "embrace closely related or overlapping offenses as well." Comment, Twice in Jeopardy, 75 Yale L.J. 262, 269 (1965). As this Court recently stated in Brown v. Ohio, 45 U.S.L.W. 4697, 4698 (U.S. 1977):

"It has long been understood that separate statutory crimes need not be identical -- either in constituent elements or actual proof -- in order to be the same within the meaning of the constitutional prohibitions [of the double jeopardy clause]."

The test for determining when a second trial is barred because it is "for the same offense" litigated in a previous trial is stated in Blockburger v. United States, 284 U.S. 299, 304 (1932) as follows:

"[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each

(cont. on page 35)

There may be a hundred ways -- a hundred distinct units of evidence -- through which the Government could prove the offense at issue in any given case,

¹¹ (cont. from page 34)

provision requires proof of a fact which the other does not"

Accord, Iannelli v. United States, 420 U.S. 770 (1975); Brown v. Ohio, 45 U.S.L.W. at 4699.

Moreover, even where two offenses are sufficiently different to permit the imposition of consecutive sentences under the Blockburger test, successive prosecutions may still be barred "where the second prosecution requires the relitigation of factual issues already resolved in the first." Brown v. Ohio, 45 U.S.L.W. at 4699 n. 6 (citing Ashe v. Swenson, 397 U.S. 436 (1970) and In re Nielsen, 131 U.S. 176 (1889)).

At any rate, the details of the Blockburger test and the holdings of Ashe and Nielsen are not important here, because the present case does not require reference to them. Blockburger, Ashe, and Nielsen all involved situations where the two offenses at issue were not identical. In the present case, however, the two offenses are identical, leaving absolutely no doubt that they are "the same offense" for double jeopardy purposes.

but that hardly entitles the Government to bring a hundred successive trials until it obtains a conviction. On the contrary, it is well established that where a count of an indictment charges an offense that may be established through proof of any of a number of different acts, a conviction or acquittal on that count bars any further prosecution for the offense on the basis of any of the acts. Crain v. United States, 162 U.S. 625, 636 (1896);¹² Hanf v. United States, 235 F.2d 710, 715 (8th

¹² "We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. And this is a view altogether favorable to an accused, who pleads not guilty to the charge contained in a single count; for a judgment on a general verdict of guilty upon that count will be a bar to any further prosecution in respect of any of the matters embraced by it."

Cir.), cert. denied, 352 U.S. 880 (1956).¹³

B. The indictment was not duplicitous. The district court's ruling on the numbers betting evidence cannot be separated from its ruling on the horse betting evidence.

In attempting to justify its characterization of the indictment as charging two separate and distinct offenses -- (1) a horse betting offense, and (2) a numbers betting offense -- the court of appeals argued that the petitioner

"could possibly have made a pretrial objection to the indictment as duplicitous. If he had, the probable response of the district court would have been to give the government the option of proceeding on either a numbers theory or a horse betting theory. See 8 Moore's Federal Practice ¶8.04[1]. We can safely

¹³ "The rule against duplicitous pleading is not offended by a count charging more than one act if the acts were part of a transaction constituting a single offense. Certainly, any similar prosecution by the government against this appellant for a violation committed at any time between the dates indicated in Count 1 of the indictment would be a prosecution for the same offense, and would be promptly dismissed."

assume that, as to [Sanabria], the government would have opted for the former and that the case would have been tried solely on a numbers theory, a fact which would have required the district court formally to dismiss an entire count of the indictment when it ruled on defendant's motion." Pet. App. 5a, n. 4.

The short answer to this argument is that what motion petitioner "could possibly have made," what the district court's "probable response" would have been, and what one can "safely assume" the Government "would have opted for" have nothing to do with this case. The petitioner's rights must be determined on the basis of what happened, not what could have happened. What happened was that the petitioner was tried on a one-count indictment encompassing both horse betting and numbers betting, and that, after being placed in jeopardy, he was acquitted.

In engaging in speculation about what might have been the case if the indictment had been drawn differently, the court of appeals ignored the fundamental role which the indictment plays in securing to a criminal defendant the protection of the double jeopardy clause. Indeed, one of the

basic criteria for testing the sufficiency of an indictment is whether it describes the offense charged with sufficient precision to enable the defendant to assert the defense of double jeopardy in the event he is later prosecuted for a similar offense. Russell v. United States, 369 U.S. 749, 763-764 (1962). Thus, since it is to the indictment that a court will turn to determine the scope of the offense for which a defendant has been prosecuted, the precise manner in which the indictment has been drafted is of the utmost importance.¹⁴ Here the Government drafted the

¹⁴ This is especially true where, as here, the criminal statute in question punishes not a narrowly defined, discrete act, but rather a course of conduct which can take numerous forms. Indictments routinely charge such complex crimes by asserting in a single count that the crime was committed in each of the numerous forms encompassed by the statute. And the defendant can be convicted under the count if the prosecution proves that he has committed the crime in any of these forms. But the double jeopardy protection which a defendant receives by virtue of being prosecuted under such a count is commensurate with the full scope of the jeopardy to which he has been subjected.

indictment against the petitioner as a single-count indictment, and petitioner's rights under the double jeopardy clause must be evaluated on that basis.

The second answer to the argument made by the court of appeals is that the indictment was not duplicitous. Duplicity is defined as "charging multiple offenses in a single count." 8 J. Moore, Federal Practice ¶8.03, p. 8-7 (2d ed., Nov. 1976 revisions). Accord, 1 Wright, Federal Practice and Procedure §142 (1969).

Here the indictment charged petitioner with violating 18 U.S.C. §1955.

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"Thus, it is recognized that charging in one count the doing of the prohibited act in each of the prohibited modes redounds to the benefit of the accused. A judgment on a verdict of guilty upon that count will be a bar to any further prosecution in respect to any embraced by it." Turf Center, Inc. v. United States, 325 F.2d 793, 796-797 (9th Cir. 1963).

Accord, Crain v. United States, 162 U.S. 625, 636 (1896).

As discussed above, this statute makes it a federal crime to engage in "an illegal gambling business." The indictment accused petitioner and his codeendants with participating in such a business. Only one "illegal gambling business" was charged. For the indictment to have been duplicitous, it would have had to have charged two discrete illegal gambling enterprises.

Read most favorably to the Government, the indictment may have enumerated two types of illegal state betting but this was not for the purpose of charging the existence of two discrete gambling businesses -- and hence two offenses -- but rather for the purpose of describing two types of activity which the single gambling business encompassed. Indeed, as pointed out earlier, the Government explicitly conceded this point in its response to the petition for certiorari:

"Although, in light of the arguments the United States made on appeal, the court of appeals did not remand for a second trial on the horse betting portion of the gambling enterprise, there was only a single gambling enterprise, albeit one that could be

proved in several ways."
Memorandum for the United
States, p. 10 (emphasis added).

Consequently, since only one gambling business was alleged, and only one violation of §1955 was charged, the indictment was not duplicitous. Indeed, the situation here is precisely analogous to that in Braverman v. United States, 317 49, 54 (1942) where this Court ruled:

"The allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for 'The conspiracy is the crime, and that is one, however diverse its objects'" (quoting Frohwerk v. United States, 249 U.S. 204, 210 (1919)).

So here, the indictment was not duplicitous because the illegal gambling business "is the crime and that is one," however many types of illegal state betting it may encompass.¹⁵

¹⁵ See also United States v. UCO Oil Co., 546 F.2d 833, 836 (9th Cir. 1976), cert. denied, 97 S.Ct. 1646 (1977) (The defendant challenged as duplicitous counts of an indictment which charged, under 18 U.S.C. §1001, both making a false statement and concealment by trick, scheme or

(cont. on page 43)

15 (cont. from page 42)

device based on a single document. The court rejected this challenge on the basis, inter alia, that the statute was directed "at a single evil" -- the perversion of the authorized functions of governmental departments and agencies -- and "the enumeration of different kinds of conduct in the statute" reflected "different modes of achieving" the prohibited result, "not separate and distinct offenses."); Driscoll v. United States, 356 F.2d 324, 331-332 (1st Cir. 1966), vacated on other grounds and remanded for further consideration sub nom. Piccioli v. United States, 390 U.S. 202 (1968) (The defendants attacked a count as duplicitous because it charged them with a violation of the wagering tax laws both as principal and as agent, and hence with two offenses. The court found this attack without merit because it found that the gravamen of the offense was "engaging in the business of accepting wagers either as principal or agent." 356 F.2d at 331. Consequently, the court held that the case came within the rule permitting a single count to allege that "the defendant committed the offense . . . by one or more specified means." Id.).

In fact, if the indictment here had been split into two counts charging petitioner with two distinct violations of §1955 -- one based on horse betting, the other based on numbers betting -- the indictment would have been vulnerable to attack as multiplicitous, that is, as charging one offense in two counts. See United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952); Bell v. United States, 349 U.S. 81 (1955); 1 Wright, Federal Practice and Procedure §142 (1969).

III. NO GOVERNMENT APPEAL FROM THE DISTRICT COURT'S RULING ON NUMBERS BETTING EVIDENCE WAS AUTHORIZED BY 18 U.S.C. §3731.

As the court of appeals expressly recognized (Pet. App. 4a), the Government may appeal an adverse judgment in a criminal case only when authorized by statute. United States v. Sanges, 144 U.S. 310 (1892). The foregoing sections of this brief have demonstrated that the Government's appeal here was barred by the double jeopardy clause. The appeal was also barred, however, because it was not authorized by the Criminal Appeals Act, 18 U.S.C. §3731.¹⁶

¹⁶ Petitioner recognizes that this Court has stated, in dictum, that, in enacting the 1970 amendment to the Criminal Appeals Act, Congress "intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." United States v. Wilson, 420 U.S. 332, 337 (1975). See also United States v. Jenkins, 420 U.S. 358, 363-364 (1975); Serfass v. United States, 420 U.S. 377, 383-387 (1975). But Justice Stevens has persuasively argued that this dictum should not be regarded as controlling. United States v. Martin Linen Supply Co., 97 S.Ct. 1349, 1357-60 (1977) (concurring

A. The ruling on numbers betting evidence was not a decision "dismissing an indictment . . . as to any one or more counts."¹⁷

18 U.S.C. §3731 permits the Government to appeal from a district court

16 (cont. from page 47)

opinion). This is especially true where, as here, the questions of statutory construction are significantly different from those presented in Wilson, Jenkins and Serfass. Moreover, even if the dictum were to be followed, a discussion of the issues here in terms of the statute would still be useful because, as demonstrated below, the statutory language itself reflects basic principles of double jeopardy jurisprudence. Thus, even if 18 U.S.C. §3731 does not provide independent, distinctively statutory grounds for barring the Government's appeal, it at least helps to demonstrate why the appeal was barred on constitutional grounds.

¹⁷ At the outset, it must be emphasized that the Government's appeal was not authorized by statute simply because 18 U.S.C. §3731 does not authorize a government appeal from an acquittal. But since the general principle has been exhaustively discussed by Justice Stevens in his concurring opinion in United States v. Martin Linen Supply Co., 97 S.Ct. 1349, 1357-60 (1977), and since this brief has already demonstrated that the decision appealed from in this case was indeed an acquittal, there is no need for further discussion of the point here.

decision "dismissing an indictment or information as to any one or more counts." The ~~district court~~ court's decision here to ~~exclude the numbers betting evidence~~ was plainly not a "dismissal" of the single-count indictment. Indeed, the irrefutable proof that the decision was not a dismissal of the indictment, is that petitioner's ten codefendants were convicted under the indictment after the decision was made. Nevertheless, the court of appeals ruled that the Government could appeal because the court found that Congress did not use the term "count" as a term of art, but rather as a shorthand expression for "any discrete basis of criminal liability." Thus, the court of appeals read 18 U.S.C. §3731 as permitting the Government to appeal from any decision dismissing "any discrete basis of criminal liability" regardless of whether that "basis of liability" constituted an entire count of an indictment. Pet. App. 5a-7a.

The trouble with this interpretation of the statute is that it totally ignores the central place which the concept of "count" occupies in the structure of double jeopardy jurisprudence. A count

is the fundamental unit of prosecution. The factfinder gives its verdict count-by-count, and the judge renders his sentence count-by-count. Consequently, the nature and scope of a count are very important matters and are very carefully regulated. Indeed, all the rules regulating the sufficiency of an indictment are really rules regulating the sufficiency of a count because the count is the basic unit of the indictment. Thus, the term count has a central and precise meaning in the criminal law based on years of usage and precedent. In contrast, the concept of "discrete basis of criminal liability" employed by the court of appeals has almost no content whatsoever.

The concept of "count" plays a particularly important role in double jeopardy jurisprudence because it is closely related to the concept of "offense." Generally speaking, each count may charge no more nor less than a single offense. And the double jeopardy clause provides that no person may be twice placed in jeopardy for "the same offense." Thus, many of the same principles that are used in regulating the scope of a count --

principles relating to such concepts as duplicity and multiplicity -- are also used in determining whether the double jeopardy clause has been violated. What is more, in determining whether a defendant can be prosecuted for an offense similar to one which has been the subject of a previous trial against him, it is to the relevant count in the initial indictment that the court will turn as primary evidence of the scope of the offense originally prosecuted.

In light of all this, the court of appeals was plainly wrong -- both as a matter of statutory construction and as a matter of constitutional law -- in failing to take the word "count" at face value. One of the primary purposes of the double jeopardy clause is to protect the defendant's legitimate interest in the finality of a decision terminating a prosecution against him. The interpretation proposed by the court of appeals, however, would seriously subvert that interest because it would permit the Government to go behind such decisions in search of "appealable" rulings made during the course of trial that "dismissed" "discrete bases

of criminal liability." Consequently, the interpretation proposed by the court of appeals must be rejected and, once it is, it becomes plain that the Government's appeal here was barred on statutory as well as on constitutional grounds.

- B. The ruling on the numbers betting was not a dismissal at all, but rather an evidentiary ruling made after the petitioner was placed in jeopardy.

18 U.S.C. §3731 provides that the Government may appeal from a decision

"suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information . . ." (emphasis added).

The plain implication of this provision is that the Government may not appeal a decision excluding evidence made after the defendant has been placed in jeopardy. The court of appeals expressly recognized this and also seemed to recognize that, under Fong Foo v. United States, 369 U.S. 141 (1962), the same conclusion is compelled by the double jeopardy clause.

Pet. App. 6a, n. 5. Accord, United States v. Lucido, 517 F.2d 1 (6th Cir. 1975). Nevertheless, the court of appeals held that the Government could appeal here because the petitioner's characterization of the district court's action as an evidentiary ruling was "inaccurate." Id. According to the court of appeals, the district court's "critical ruling" was that "the indictment failed to charge a violation of §1955 on a numbers theory." Id. That the numbers evidence was "subsequently formally excluded" was in the view of the court of appeals "immaterial since the earlier ruling rendered the evidence irrelevant in any case." Id.

The court of appeals' reasoning is strained, to say the least. Petitioner was tried with ten codefendants, all of whom joined in the motion with respect to the numbers evidence. Following the district court's determination of that motion -- which, it should be noted, the court characterized as a "motion to strike" -- the court and counsel for both sides engaged in the laborious process of separating the documentary horse betting evidence from the documentary numbers

evidence so that the latter could be excluded. The case went to the jury on the horse betting evidence, and all of petitioner's codefendants were convicted. In the face of this process, the contention that the district court's action was not "an evidentiary ruling" is simply not tenable.

As for the court of appeals' argument that the district court's ruling was not truly "evidentiary" because it was predicated on a ruling pertaining to the indictment, it need only be pointed out that there are countless times when a trial court is called upon to make a ruling on the relevance of a piece of testimony that requires it to determine the legitimate scope of the indictment. The fact that such rulings require underlying decisions regarding the indictment, however, hardly deprive them of their character as evidentiary rulings. But, under the court of appeals' formula, the Government would have a legitimate claim to appeal each of those rulings. Such a claim would plainly contradict the intent of §3731 and this Court's interpretation of the double jeopardy clause.

Conclusion

The judgment of the court of appeals should be vacated and the case remanded to that court with a direction that the Government's appeal be dismissed for lack of appellate jurisdiction, and with a further direction that petitioner not be retried for violating 18 U.S.C. §1955 on the basis of numbers evidence, or, for that matter, on any other basis.

Respectfully submitted,

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